

400 KAR 1:060. Confidentiality of records or other information furnished to or obtained by the Environmental and Public Protection Cabinet.

RELATES TO: KRS 61.870-61.884, 152.590, Chapters 146, 151, 224, 224A

STATUTORY AUTHORITY: KRS 224.10-100, 224.10-210, 224.10-212

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-210 and 224.10-212 require the cabinet to adopt rules and administrative regulations regarding the designation of records and information as trade secrets and confidential business information. This administrative regulation sets forth the definitions and procedures for designation, with the exception that this administrative regulation does not apply to records or other information furnished to or obtained by the cabinet pursuant to the provisions of KRS Chapter 350.

Section 1. Definitions. Whenever used in this administrative regulation the following terms shall have the meaning as set forth herein:

(1) "Record or other information" means all books, papers, maps, photographs, cards, tapes, discs, recordings or other documentary materials regardless of physical form or characteristics, which are furnished to or obtained by the cabinet; provided that, this administrative regulation does not apply to any record or other information furnished to or obtained by the cabinet pursuant to the provisions of KRS Chapter 350;

(2) "Cabinet" means the Environmental and Public Protection Cabinet;

(3) "Trade secret" means a novel or unique plan or process, tool, mechanism or compound, known only to its owner, his employees or former employees, or persons under contractual obligation to hold the information in confidence, which has been perfected and appropriated by the exercise of individual ingenuity, and which gives him an opportunity to retain or obtain an advantage over competitors who do not know it;

(4) "Confidential business information" means any record or other information relating to hazardous waste, which is not of public knowledge or general knowledge in the trade or business, furnished to or obtained by the cabinet, the disclosure of which would be likely to have either of the following effects:

(a) To impair the cabinet's ability to obtain the necessary information in the future; or

(b) To create an unfair advantage in the competitors of the person from which the information was obtained.

(5) "Effluent data" means, with reference to any source of discharge of a pollutant as that term is defined in 401 KAR 5:050:

(a) Information necessary to determine the identity, amount, frequency, concentration, temperature or other characteristics (to the extent related to water quality) of any pollutant which has been discharged by the source (or of any pollutant resulting from any discharge from the source), or any combination of the foregoing;

(b) Information necessary to determine the identity, amount, frequency, concentration, temperature or other characteristics (to the extent related to water quality) of the pollutants which, under an applicable standard or limitation, the source was authorized to discharge (including, to the extent necessary for such purpose, a description of the manner or rate of operation of the source);

(c) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation or operation constituting the source);

(d) Information required by a KPDES application form, including information submitted on the forms themselves and any attachments used to supply information required by the forms, and Kentucky Pollution Discharge Elimination System permits; and

(e) Notwithstanding the foregoing, the following information shall be considered to be "effluent da-

ta" only to the extent necessary to allow the cabinet to disclose publicly that a source is or is not in compliance with an applicable standard or limitation, or to allow the cabinet to demonstrate the feasibility, practicability, or attainability or lack thereof of an existing or proposed standard or limitation:

1. Information concerning research, or the results of research, on any product, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

2. Information concerning any product, method, device or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

(6) "Emission data" means, with reference to any source of emission of any substance into the air:

- (a) Information necessary to determine the identity, amount, frequency, concentration or other characteristics (to the extent related to air quality) of the emissions which have been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

- (b) Information necessary to determine the identity, amount, frequency, concentration or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source);

- (c) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish from other sources (including, to the extent necessary for such purposes, a description of the device, installation or operation constituting the source); and

- (d) Notwithstanding the foregoing, the following information shall be considered to be "emission data" only to the extent necessary to allow the cabinet to disclose publicly that a source is or is not in compliance with an applicable standard or limitation, or to allow the cabinet to demonstrate the feasibility, practicability or attainability or lack thereof of an existing or proposed standard or limitation:

1. Information concerning research, or the results of research on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

2. Information concerning any product, method, device or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

(7) "Owner" or "owner or operator" means the owner of a proprietary interest in a trade secret or confidential business information.

Section 2. Asserting Claims of Entitlement to Confidential Treatment. (1) An owner or operator submitting a record or other information to the cabinet may assert a claim that the record or other information, not related to emission data or effluent data, is entitled to confidential treatment as a trade secret or confidential business information.

(2) The claim may be asserted by placing on or attaching to the record or other information a cover sheet, stamped or typed legend, or other suitable form of notice employing the language "trade secret" or "confidential business information" as applicable. Allegedly confidential portions of otherwise nonconfidential documents should be clearly identified by the owner or operator, and shall be submitted separately to facilitate identification and handling by the cabinet. The allegedly confidential portion shall be submitted as a separate enclosure with the nonconfidential portions. The text of the nonconfidential portion of the record or other information shall cross-reference the allegedly confidential portions where applicable, so as to permit identification. If the owner or operator desires confidential treatment only until a certain date or until the occurrence of a certain event, the notice should so state.

(3) The claim shall be limited to the record or other information, or portion thereof, for which a claim of entitlement to confidential treatment may reasonably be asserted in good faith, and shall not

be asserted for any record or other information relating to emission data or effluent data.

(4) After the effective date of this administrative regulation, the claim shall be asserted at the time of submittal of the record or other information to the cabinet. Provided that, the claim for any record or other information furnished to the cabinet within thirty (30) days of the effective date of this administrative regulation shall be asserted within sixty (60) days of the effective date.

(5) An owner or operator may assert a claim for any record or other information submitted to the cabinet prior to the effective date of this administrative regulation and previously marked as confidential. The claim shall be asserted by filing a statement, as set forth in Section 3 of this administrative regulation, within thirty (30) days of the effective date of this administrative regulation.

(6) Failure to assert a timely claim shall result in the record or other information being open to reasonable public inspection.

Section 3. Statement of Basis for Claim. (1) When a claim that a record or other information is entitled to confidential treatment is made, the owner or operator shall submit a statement in support of the claim.

(2) The statement shall contain:

(a) The name and address of the owner or operator;

(b) The reason for submitting the record or other information to the cabinet, including whether the submittal is voluntary or required by law;

(c) Whether there has been a previous determination by a court, an Environmental Protection Agency legal office acting under 40 CFR Part 2, Subpart B, or other governmental agency that the record or other information is, or is not, entitled to confidential treatment;

(d) The measures taken by the owner or operator to protect the confidentiality of the record or other information, and whether it intends to continue to take such measures;

(e) Whether the information is not, and has not been, reasonably obtainable without the owner or operator's consent by other persons, other than governmental bodies, by use of legitimate means (other than discovery based upon a showing of special need in a judicial or quasi-judicial hearing);

(f) Whether the record or other information is customarily held in confidence by the owner or operator and persons like them;

(g) For a claim relating to confidential business information, the manner in which disclosure of the information is likely to create an unfair advantage in the competitors of the owner or operator; and

(h) For a claim relating to confidential business information, the basis for asserting that disclosure is likely to impair the cabinet's ability to obtain necessary information in the future.

(3) The statement shall not contain or reveal the record or other information for which the claim is asserted, but shall reference the record or other information to which it applies. The statement shall be open to reasonable public inspection.

(4) When an owner or operator has asserted a claim that a record or other information constitutes a trade secret or confidential business information, the record or other information will be treated as confidential until the cabinet determines that the record or other information is not entitled to confidential treatment and the owner or operator has been given fifteen (15) days written notice of the determination.

Section 4. Designation. (1) Upon submission of the statement required by Section 3 of this administrative regulation, the cabinet will determine whether the record or other information is entitled to confidential treatment as a trade secret or confidential business information.

(2) The cabinet may request the owner or operator to submit additional information to show that the record or other information is entitled to designation as a trade secret or confidential business information.

(3)(a) In the case of a claim for confidential treatment of a record or other information submitted to

the cabinet prior to the effective date of this administrative regulation, the designation or denial will be made within twenty (20) working days of receipt of the statement asserting the claim.

(b) In the case of any other record or information furnished to the cabinet, following the effective date of this administrative regulation, the designation or denial shall be made within twenty (20) working days of receipt of the claim for confidential treatment.

(4) In making a determination to designate a record or other information as entitled to confidential treatment as a trade secret or confidential business information, the cabinet shall consider the statement submitted pursuant to Section 3 of this administrative regulation and any other relevant information, including information submitted by the public. The cabinet may deny the claim if it is not limited to a record or other information, or portion thereof, which is reasonably entitled to confidential treatment, or not asserted in good faith. The statement shall establish that the record or other information is entitled to confidential treatment. Failure to do so shall result in denial of the claim.

(5) The burden to show that a record or other information is entitled to confidential treatment is on the owner or operator.

(6) Notice of the determination and the reason therefor shall be given to the owner or operator at the address set forth in the statement.

Section 5. Open Records Litigation. (1) If the cabinet makes a determination that a record or other information is entitled to confidential treatment, and the determination is challenged pursuant to the provisions of the Kentucky Open Records Act, KRS 61.870 et seq., or KRS 224.10-420 the cabinet may, in the defense of its designation, call upon the owner or operator to assist in the defense.

(2) To enable the owner or operator to protect its interest, the cabinet will notify the owner or operator within ten (10) working days of services of the complaint or initiating document upon the cabinet. (13 Ky.R. 1681; 1859; eff. 5-14-1987; Crt eff. 7-3-2018.)